No. SC86519

IN THE
SUPREME COURT OF MISSOURI

SIX FLAGS THEME PARKS, INC.,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

Petition for Judicial Review
From the Missouri Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner

APPELLANT'S REPLY BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

Post Office Box 899
Jefferson City, MO 65102
(573) 751-3700
(573) 751-5391 (FAX)
evan.buchheim@ago.mo.gov

Attorneys for Appellant
Director of Revenue

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Error! No table of authorities entries found.

Constitutions and Statutes

Error! No table of authorities entries found.

Other Authorities

Error! No table of authorities entries found.

ARGUMENT

In deciding the issue in this case, this Court must necessarily resolve the tension between its decisions in *Tropicana*[1] and *Blue Springs Bowl*[2] with its decisions in *Westwood*[3] and *Six Flags*.[4] While tacitly acknowledging this to be the case, Six

---

[1]*Eighty Hundred Clayton Corp. d/b/a Tropicana Lanes v. Director of Revenue*, 111 S.W.3d 409 (Mo. banc 2003) (*Tropicana*).

[2]*Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo. banc 1977).

[3]*Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999).

[4]*Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526 (Mo.

Flags's resolution to this complicated issue involves the simple application of a two-word Latin phrase: *stare decisis*. In other words, the legal analysis Six Flags relies on suggests that the tax world is divided into two categories: bowling alleys and everyone else. Since it is not a bowling alley, Six Flags argues that the decisions in *Tropicana* and *Blue Springs Bowl* do not apply in this case. While this rudimentary analysis may pass for a tactic to win a single case, it does little to assist this Court in achieving an integrated and coherent interpretation of the sales tax law.

To support its invocation of *stare decisis*, Six Flags suggests that this case is distinguishable from *Tropicana* because it made free inner tubes available to customers, while the taxpayer in Tropicana required its customers to wear bowling shoes in order to bowl. Six Flags's attempt to distinguish its case from *Tropicana* in this manner suffers from two readily apparent legal and factual deficiencies.

First, on many of its water rides, Six Flags required its customers to use inner tubes — just as the taxpayer in Tropicana required customers to wear bowling shoes. (L.F. 241, 247). Although Six Flags made "free" inner tubes available for use on these rides, in many cases customers had to wait for these inner tubes to become available, while customers who had paid inner tubes did not have to wait. (L.F. 241-42, 247-48). Also, "free" inner tubes could not be removed from the ride at which

---

banc 2003).

they were obtained. (L.F. 241, 247). In other words, customers could not carry a "free" inner tube from ride to ride. Finally, Six Flags provided no "free" inner tubes for use in the wave pool. (L.F. 242, 248). Although customers could use the wave pool without an inner tube, those wishing to use an inner tube had to pay Six Flags the fee for a paid tube. (L.F. 242, 248).

Second, as everyone knows (except, apparently, Six Flags and its counsel), bowling alley customers are not required to pay a fee to use the bowling alley's shoes as a condition of participating in the activity of bowling. In fact, many bowlers bring their own bowling shoes to the alley. This Court's opinion in *Tropicana* reveals that the record in that case supported this matter of common knowledge:

> Tropicana requires that all bowlers wear bowling shoes. Customers may bring and use their own shoes, or, for a fee separate from the bowling fee, use shoes provided by Tropicana.

Tropicana, 111 S.W.3d at 410. The record in this case, however, is entirely silent on whether Six Flags's customers could bring their own inner tubes inside the water park.

Consequently, Six Flags's attempt to distinguish *Tropicana* from the facts of this case is unconvincing. Other than suggesting that *Tropicana* applies only when the taxpayer is a bowling alley, the only other distinguishing factor Six Flags mentions is that it provided its customers a limited number of free inner for their use, while the

bowling alley in *Tropicana* apparently did not have "free" bowling shoes available for its customers' use. Is Six Flags really suggesting that if the bowling alley in *Tropicana* had provided a limited number of free bowling shoes for its customers' use, its bowling-shoe fee would have been exempt from tax? Nothing in the sales tax law or this Court's previous cases supports this argument.

The other arguments Six Flags musters to support its refund claim are also similarly deficient.

For example, rather than reasoned legal argument explaining why this Court's decisions in *Westwood* and *Six Flags* reflect a proper interpretation of the sales tax law superior to that employed in *Blues Springs Bowl* and *Tropicana*, Six Flags employs a less-than-creative use of sarcastic jargon. To simply dismiss the Director's arguments as "rehashed" and "shop-worn" does little to assist this Court in performing its constitutional duty to construe state revenue laws.

Six Flags's favorite scare tactic to justify its refund claim is to invoke the phrase "double taxation." The Director's position in this case does not amount to double taxation because the amusement and lease taxes apply to different transactions. Section 144.020, RSMo Supp. 2004, which identifies the tax rate applied to the sale of personal property and taxable services, separately identifies fees and charges paid to places of amusement and the amounts paid or charged for the rental or lease of personal property as distinct and separate taxable transactions. Moreover, Six Flags's argument is curious in light of the fact that both the Director and Six Flags

claim — albeit for different reasons — that Six Flags's inner-tube fee was not taxable under the lease tax.

Six Flags's argument that double taxation occurs if tax is collected on both its inner tube purchases and its inner tube fees ignores the legal reality that separate transactions are being taxed under distinct taxing provisions. The purchase of tangible personal property is taxed separately from the fees a place of amusement charges its customers to engage in amusement activities. Six Flags purchases the inner tubes and, in effect, consumes them as part of its business of providing amusement activities to its customers. This does not constitute double taxation anymore than if a restaurant were to claim that its purchase of a chef's knife to cut lettuce should be exempt from tax because it collects tax on its customers' purchases of salad. Although two different taxes are at issue — the tax on the sale of tangible personal property and the tax of sales of food and drink — they tax different transactions and are paid by different taxpayers; thus both taxes apply under the sales tax law.

In the end, however, whether Six Flags's inner tube purchases were exempt or excluded from sales tax is not an issue in this case. Consequently, it is entirely premature for Six Flags to claim that the Director's argument leads to double taxation when that issue has yet to be addressed.

Six Flags also takes issue with the analysis the dissent in *Six Flags* placed on the specific amusement-tax exemption contained in the lease tax (§ 144.020.1(8),

RSMo Supp. 2004) pertaining to boats and outboard motors. It argues that this exemption is simply designed to ensure that boats and outboard motors are taxed under the provisions specifically applicable to them (§§ 144.070 and 144.440, RSMo 2000), rather than under the amusement tax. But this argument ignores the fact that the second sentence of this exemption provides that "[n]o tax shall be collected on the rental or lease of motor vehicles, trailers, boats, and outboard motors, except as provided in sections 144.070 and 144.440." Even under Six Flags's theory, this sentence should have been enough to exempt these transactions from tax notwithstanding the language of the amusement tax.

But the legislature didn't stop with that sentence. Instead, it immediately following that sentence with one that provided a specific amusement-tax exemption for charges to use boats and outboard motors:

> In no event shall the rental or lease of boats and outboard motors be considered a sale, charge, or fee to, for or in places of amusement, entertainment or recreation, nor shall any such rental or lease be subject to any tax imposed to, for, or in such places of amusement, entertainment or recreation.

There are only two reasons why the legislature would have logically believed a specific amusement-tax exemption was still necessary; and both reasons militate against Six Flags's argument.

First, this exemption was necessary because the legislature could have

believed that a fee paid to a place of amusement to use boats or outboard motors did not constitute a true "lease" or "rental" of that property as those phrases are used under the lease tax. The second reason is that the legislature understood that a fee charged by a place of amusement to use this equipment was a separate and distinct taxable transaction than a mere lease or rental of it. In other words, simply stating that the lease or rental of such property was taxed only under the statutory sections pertaining to the lease or rental of boats and outboard motors would not automatically exempt from tax a fee charged by a place of amusement to use this equipment because these distinct transactions are taxed under different provisions. The addition of a specific amusement-tax exemption for boats and outboard motors within the lease tax itself is also strong evidence that the legislature has not adopted the specific-vs.-general theory of taxation first enunciated in *Greenbriar I*.[5] In addition, this exemption also shows that the legislature did not believe that a specific tax exemption contained in the lease tax could be applied to transactions clearly taxable under the amusement tax.

Six Flags also relies on three other authorities — this Court's opinion in *Moon*

[5]*Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996) (*Greenbriar I*).

Shadow v. Director of Revenue, 945 S.W.2d 436 (Mo. banc 1997), a Department of Revenue regulation, and a letter ruling issued by the Director — to support its claim that its inner tube fee is a lease or rental of personal property and that the lease tax exemption applies to exempt that transaction from the amusement tax. Six Flags's reliance on these authorities, however, does not ultimately assist this Court in answering the questions posed by this case.

Six Flags places heavy reliance on the fact that this Court in *Moon Shadow* referred to the charge the taxpayer imposed on customers to use an inner tube to float down a river located in a national forest as a "rental" charge. But the only issue decided in *Moon Shadow* was whether the taxpayer operated a place of amusement. Because the taxpayer did not operate a place of amusement, this Court never addressed the taxpayer's contention that its "rental" charges were exempt from all tax under the lease-tax exemption because it paid tax when it purchased the inner tubes. *Id.* at 436-37.

Six Flags's reliance on the Director's rule, 12 CSR 10-3.228, which provides that even property remaining on the taxpayer's property can still be considered rented, is equally unavailing because that rule solely pertains to the lease tax; it does not purport to address any aspect of the amusement tax. Yet, Six Flags overlooks another rule that expressly taxes transactions similar to the one at issue in this case:

> Example: Mr. A is the owner and operator of a bowling alley and purchases bowling shoes for use in operating the bowling alley. Mr. A shall pay tax on the

purchase of the bowling shoes. When Mr. A charges his customers for the use of the bowling shoes, the usage fees are subject to sales tax as a fee paid in a place of amusement even though sales tax was previously paid on the purchase of the shoes.

12 CSR 10-3.176(10).

Six Flags's reliance on the letter ruling pertaining to baggage carts used in shopping malls and airports is unconvincing since the transactions described in that letter did not involve a place of amusement. Moreover, letter rulings apply only to the person requesting the letter and to a specific set of facts, and they bind the Director for only three years. Section 536.021.10, RSMo 2000; 12 CSR 10-1.020(8) and (9). The letter ruling cited by Six Flags does not involve the specific fact situation present in this case, and it was issued in 1998 — seven years ago. Not surprisingly, rule 12 CSR 10-1.020(9) provides that a letter ruling ceases to be binding if "[a] pertinent change in the interpretation of the law is made by a court of law . . . ." This case provides a forum for just such a change.

Notwithstanding previously promulgated rules or issued letter rulings, this Court's resolution of this, or any other tax case, has the potential to make the Director's rules and letter rulings obsolete. This Court has the ultimate authority to construe the revenue laws. Six Flags's refund claim raises issues not completely addressed by the current rules or previous letter rulings. This requires the Director to advocate positions in the context of this case that could not have been contemplated

before Six Flags forced this issue by filing a refund claim seeking a refund of sales tax it collected on its inner tube purchases. This Court's resolution of the issues in this case will determine what, if any, rules or letter rulings are inconsistent with the taxing statutes.

Finally, Six Flags exerts a substantial amount of effort to demonstrate to this Court that nothing in the record shows that the sales tax it seeks to have refunded was collected from its customers. Six Flags also complains about that part of the AHC's opinion finding that Six Flags is receiving a "windfall" because it is not required to return the sales tax refund to its customers and the AHC's conclusion that this result is "inequitable." (L.F. 253). But if Six Flags's customers did not pay the tax, who did? Because no one disputes that the tax was, in fact, paid to the Director, the answer Six Flags seemingly suggests by its argument is that it paid the tax. Presumably, because the record does not show that Six Flags actually paid the tax, Six Flags never affirmatively asserts that it paid the tax in this case.

The major deficiency with Six Flags's argument is that it had the burden of proof before the Administrative Hearing Commission in this tax-refund case. Sections 136.300 and 621.050.2, RSMo 2000. Yet, despite its ability to do so, Six Flags offered no evidence outside the parties' stipulation that it, in fact, collected no sales tax from its customers on the inner tube fees it charged. The sales tax law, however, not only presumes, but mandates, that the seller (in this case Six Flags) will collect any sales tax due on the transaction from the purchaser (in this case the customers

paying the inner-tube fees).

For example, § 144.060, RSMo 2000, makes it the "duty of every person making a purchase or receiving a service on which a tax is imposed . . . to pay . . . the amount of such tax to the person making such sale or rendering such service." That section makes it a crime for a purchaser to refuse to pay the tax. Section 144.080.1, RSMo 2000, makes it the seller's responsibility to collect the tax levied under the sales tax law, while § 144.080.5 makes it unlawful for any seller "to advertise or to hold out or state to the public or to any customer directly or indirectly" that any sales tax owed "will be assumed or absorbed" by the seller. A different section, § 144.157.1, RSMo Supp. 2004, makes it a crime for a seller to willfully fail to collect the sales tax owed on a transaction. Finally, the word "tax" is statutorily defined as the amount "payable by the *purchaser* of a commodity or service subject to tax." Section 144.010(12), RSMo Supp. 2004 (emphasis added).

In light of these many statutory provisions making the purchaser liable for the sales tax owed, coupled with Six Flags's failure to offer any evidence that it did not collect tax from its customers, it is improper for Six Flags, who had the burden of proof in this case, to parse the record in support of its claim that nothing in the record shows that it collected the tax from its customers. The law presumes that it did, and the AHC found that Six Flags would receive a windfall. Consequently, it was Six Flags's responsibility to adduce evidence showing otherwise, and it should not now be heard to complain about the lack of evidence in a case in which it had the burden of

proof.

CONCLUSION

The AHC erred in setting aside the Director's decision denying Six Flags's refund claim and in awarding Six Flags $23,490.73 in sales taxes Six Flags collected from its customers and remitted to the Director. The AHC's decision should be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

EVAN J. BUCHHEIM
ASSISTANT ATTORNEY GENERAL
Mo. Bar Number 35661

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3700
(573) 751-5391 (FAX)
evan.buchheim@ago.mo.gov

ATTORNEYS FOR APPELLANT
DIRECTOR OF REVENUE

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 2937 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on August 2, 2004, to:

Edward F. Downey
Bryan Cave LLP
221 Bolivar St., Suite 101
Jefferson City MO 65101-1574

_____
Assistant Attorney General